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IN THE

# Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
*Petitioner*,

v.

GARRY V. GIDDENS,
*Respondent*.

**On Petition for a Writ of Certiorari to the Supreme Court of Missouri**

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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## MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner has consented to AAR's filing of a brief.[1] Respondent has refused consent.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR seeks leave to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad

[1] The letter expressing consent has been filed with the Clerk of the Court.

industry as a whole—and in those instances such requests have been granted.[2]

In this case, the court below followed several other lower courts in attributing to a prior decision of this Court a hard and fast rule prohibiting any mention of the fact that a railroad employee seeking compensation under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, is already receiving a substantial disability benefit under the Railroad Retirement Act of 1974 (RRA), 45 U.S.C. §§231-231u. As a result of this and like rulings in other jurisdictions, a FELA jury may not consider the impact receipt of these benefits may have on the plaintiff's motivation to return to work or take them into account when deliberating on a damages award. The inability to offer evidence, highly relevant and probative to the plaintiff's allegation of a permanent work-related disability, greatly disadvantaged petitioner in this FELA case, as it has numerous other railroads in other cases over the years. This rule, which traces its origins to nothing more than dicta by this Court, confers an enormous and unwarranted disadvantage on railroad defendants in numerous cases arising under FELA.

When AAR participates in a case like this one as *amicus curiae,* it brings a broad, industry-wide perspective to the issue before the court. AAR works closely with its member railroads on a host of issues arising under FELA and other statutes, like the RRA, that have been enacted to apply uniquely to railroads. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of nearly 1000 attorneys representing railroads

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[2] *E.g., Consolidated Rail Corp. v. Wicker,* 119 S.Ct. 530 (1998); *CSX Transp., Inc. v. Sirbaugh,* 117 S. Ct. 1289 (1997); *Norfolk & Western Ry. v. Chittum,* 117 S. Ct. 597 (1996); *Metro-North Commuter R.R. v. Buckley,* 117 S.Ct. 379-80 (1996). All granting motion of AAR to participate as *amicus curiae.*

nationwide in personal injury litigation. Thus, AAR is thoroughly familiar with the two federal railroad statutes involved in this case, and the impact of the lower court's ruling on railroads nationwide. (While AAR agrees with petitioner's position that use of a special Missouri verdict form for FELA cases raises important constitutional issues, it is limiting its brief to the issue of the admissibility of Railroad Retirement disability benefits, as the former issue appears limited to cases tried in one state.)

As a trade association representing the nation's major railroads, AAR can assist this Court in understanding the impact of the lower court's ruling, by bringing the perspective of an entire industry, which often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole. In this case, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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## BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

## STATEMENT OF INTEREST OF AMICUS CURIAE [1]

*Amicus curiae* Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues and employ 90 percent of rail workers. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

One such matter is the Federal Employers' Liability Act (FELA). 45 U.S.C. §§51-60. In 1908, before the concept of no-fault workers' compensation had gained a foothold in the United States, Congress enacted this tort-based remedy for railroad employees injured on the job. Subsequently, every state has enacted a workers' compensation law to cover employees within their jurisdiction. Under these laws, the concept of assigning fault for workplace injuries has been abandoned in favor of the principle that all employees suffering work-related injuries are deserving of compensation. Today, the railroad industry remains virtually the only one where work-related injuries are compensated under a fault-based system.[2] A key difference between the workers' compensation systems and FELA is that the former cap the employers' liability, but the latter does not.[3]

Each year, thousands of claims and lawsuits are asserted under FELA against AAR members and other railroads.[4] In

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[2] Seamen are covered under FELA by virtue of 46 U.S.C. § 688. All other industries in the United States are covered by either state or federal no-fault workers' compensation systems.

[3] "[T]he amount of compensation for disability depends on the workers' previous earning level, for most acts award a percentage of average wage, somewhere between a half and two-thirds. But practically all acts also set a maximum in terms of dollars per week . . ." 1 A. LARSON & K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 1.03[5] (2000 ed.). "It was never intended that compensation payments [under workers' compensation] should equal actual loss, if for no other reason than that such a scale would encourage malingering." *Id.* On the other hand, a compensatory damages award under FELA will be deemed excessive only if it "shocks the judicial conscience." *Schneider v. National R.R. Passenger Corp.*, 987 F.2d 132, 137 (2d Cir. 1993). ($1.75 million verdict, including over $1 million in intangible damages, not excessive).

[4] In 1999, 4,970 FELA lawsuits were filed. ASSOCIATION OF AMERICAN RAILROADS, 1999 CLAIM & LITIGATION REPORT 3-3 (2000). Because FELA awards for pecuniary losses are not capped, and because there is a potential for the awarding of substantial noneconomic damages,

many cases, as did respondent in this case, the injured employee alleges a permanent disability and seeks compensation covering lost wages for the remainder of his or her projected work life. Because of the open-ended nature of damages available under FELA, awards in these cases can be substantial. In this case, it exceeded $1.5 million.

In addition to being afforded unique treatment through coverage under FELA, railroads and their employees are covered by the Railroad Retirement Act of 1974 (RRA), 45 U.S.C. §§231-231u, another system designed exclusively for the railroad industry. Among the benefits provided under this statute are disability annuities, available to employees who qualify on the basis of age and/or years of service.[5] Depending on the nature of the disability suffered, rail employees may qualify for one of two kinds of disability benefits. Employees who are unable to work at any regular employment may qualify for total and permanent disability benefits.[6] Even if not qualified for total and permanent disability benefits, employees who are disabled from working in their regular occupation on the railroad may qualify for an occupational disability benefit.[7] This special benefit, the kind which was received by respondent, is not available to workers covered by Social Security.

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FELA is more costly than the workers' compensation systems. *See* Transportation Research Board, *Special Report No. 241: Compensating Injured Railroad Workers Under the Federal Employers' Liability Act* 163-64 (1994). In 1999, the railroad industry spent about $850 million in payment and administration of FELA claims and lawsuits. CLAIM & LITIGATION REPORT at 2-7.

[5] 45 U.S.C. § 231a.

[6] 45 U.S.C. § 231a(a)(1)(v). To qualify for a total and permanent disability annuity an employee must have at least ten years of service.

[7] 45 U.S.C. § 231a(a)(1)(iv). To qualify for an occupational disability annuity an employee must have either twenty years of service, or must be 60 years old with ten years of service.

A significant number of railroad employees receive RRA disability benefits. In fiscal year 1999, 5,100 disability annuities were awarded to railroad workers, of which 4,000 were for occupational disability.[8] During that period, the average monthly occupational disability benefit awarded was $1,912; the average monthly total and permanent disability benefit awarded was $1,176.[9] As of September 30, 1999, disability annuities were being paid to about 80,000 former railroad workers, about three-quarters of which were occupational disability annuities.[10] These individuals received over $1.3 billion in disability benefits in fiscal 1999, the majority of which, $1.130 billion, went to occupational disability annuitants.[11]

This case is representative of an all too common situation where, in addition to obtaining a large FELA award, the plaintiff also received, and will continue to receive, a substantial occupational disability benefit. A railroad employee may qualify for a disability benefit regardless of whether the disability resulted from a work-related injury also covered by FELA, or some other cause. Therefore, employees claiming to have been injured on the job may, if they

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[8] U.S. Railroad Retirement Board, 2000 Annual Report 18 (2000) ["RRB Annual Report"]. The overwhelming majority of occupational disability applicants are granted awards by the Railroad Retirement Board: in 2000, about 98% of the applications were granted. *See* Letters from Catherine A. Leyser, Director of Assessment and Training, Railroad Retirement Board to Laura Welch, M.D. and Dennis Richling, M.D. (containing RRB Office of Programs Assessment and Training Monthly Updates for calendar year 2000). Thus, employees who claim to be unable to work in their previous occupation, including those who allege the cause as being a work-related injury, are virtually assured of receiving a disability benefit.

[9] RRB Annual Report at 18.

[10] *Id.* at 19.

[11] *Id.*

meet the eligibility requirements, collect disability benefits and, at the same time, pursue a remedy under FELA for the same injury. The awarding of a FELA settlement or judgment does not terminate Railroad Retirement disability payments (however, return to gainful employment would. 45 U.S.C. § 231a(e)(4)). Thus, FELA and the Railroad Retirement System often provide an employee with two sources of benefits for the same loss.

Both FELA and the Railroad Retirement System are supported by huge infusions of funds from the railroad industry through a tax on payroll. The underlying purpose of both systems is laudable and not in question. However, court-made rules which require a railroad employer to pay twice, by funding benefits under both systems for the same purpose, should be scrutinized because such rules impose an unwarranted and unfair financial burden on a sector of the economy without advancing the purpose of either FELA or the RRA. AAR members, therefore, have a strong interest in seeking review of court decisions, like the ruling below, which perpetuate such an outcome.

## STATEMENT OF THE CASE

*Amicus* adopts the statement of the case in petitioner's brief.

## SUMMARY OF THE ARGUMENT

Nearly four decades ago, in a case where the issue was not raised by the parties, this Court opined that a FELA plaintiff's receipt of occupational disability benefits under the RRA may not be used to mitigate damages for lost earnings. This Court went on to rule that the prejudicial effect of introducing such evidence for the purpose of calling into question the plaintiff's motivation to return to work outweighed its probative value, affirming a judgment originally made by the trial court in that case. Since that time, virtually all courts hearing FELA cases, including the court below, have felt

constrained to adhere to a *per se* rule of inadmissibility of evidence of receipt of RRA disability benefits, preserving windfall double recoveries for FELA plaintiffs.

Though these rulings purport to be based on the traditional collateral source rule, the rationale for that rule does not apply with respect to RRA occupational disability benefits. The collateral source rule applies where the source of the plaintiff's other compensation is wholly independent of the tortfeasor. However, railroad companies fund the lion's share of the occupational disability program, and thus are being made to pay twice to compensate employees for the same disability, resulting in a multimillion dollar financial liability.

In lawsuits outside of the FELA context, courts have permitted offsets where the defendant was the source of additional payments to the plaintiff, including where the additional payments were made pursuant to a government program like Social Security. Following this approach in FELA cases, by permitting introduction of evidence that the plaintiff is eligible for RRA occupational disability benefits, would be consistent with FELA's purpose, which is to make the injured employee whole, but not to employ special rules which unduly inflate damages awards.

## ARGUMENT

### I. THIS COURT SHOULD REVIEW THE DECISION BELOW BECAUSE AS HAVE SEVERAL OTHER LOWER COURTS IT MIS-INTERPRETS AN IMPORTANT ASPECT OF THE FELA

#### A. Lower Courts Have Relied On Dicta In This Court's *Eichel* Decision To Improperly Exclude Relevant Evidence And Require Railroads To Fund A Double Recovery For Many FELA Plaintiffs

Thirty-five years ago, in *Eichel v. New York Central R.R.*, 375 U.S. 253 (1963), a case brought under FELA, this Court simply acknowledged that the defendant railroad had not asserted that it should be permitted to introduce evidence that the plaintiff was receiving RRA disability benefits in order to mitigate the damages for which the defendant might be liable.[12] This dicta has taken on a life of its own, and in the ensuing years "[c]ourts have consistently interpreted *Eichel* to preclude admission of evidence of collateral benefits whether such evidence is presented during the liability or damages phase of the trial", *Sheehy v. Southern Pac. Transp. Co.*, 631 F.2d 649, 651-52 (9th Cir. 1980).[13] As a result, millions of

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[12] "Respondent does not dispute that it would be highly improper for the disability pension to be considered in mitigation of the damages suffered by petitioner." 375 U.S. at 254. Instead, the defendant railroad argued only that evidence of receipt of railroad retirement benefits should be admitted to show malingering by the plaintiff.

[13] *E.g., Green v. Denver & Rio Grande Western R.R.*, 59 F.3d 1029 (10th Cir. 1995); *Wilcox v. Clinchfield R.R.* 747 F.2d 1059 (6th Cir. 1984); *Sheehy v. Southern Pac. Transp. Co.*, 631 F.2d 649 (9th Cir. 1980); *Fuhrman v. Reading Co.*, 439 F.2d 10 (3rd. Cir. 1971); *Caughman v. Washington Terminal Co.*, 345 F.2d 434 (D.C. Cir. 1965); *Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820 (5th Cir. 1965). In *Green*, the Tenth Circuit insisted that the reference in *Eichel* to the inadmissibility of

dollars in windfall has accrued to FELA plaintiffs at the expense of the nation's railroads.

As it frequently does in FELA litigation, this Court's *Eichel* decision played a significant role in the case below. The petitioner sought to introduce evidence that respondent was receiving an $18,000 annual RRA disability pension, as a fact which the jury might deem relevant in assessing respondent's motivation to return to work. The trial court ultimately found in petitioner's favor on this issue, but was reversed by the state appellate court.[14] Citing *Eichel*, the Missouri Supreme Court stated that "evidence of a plaintiff's receipt of disability pension payments under the Railroad Retirement Act is inadmissible at trial under the 'collateral source doctrine' . . ." *Giddens v. Kansas City Southern Ry. Co.*, 29 S.W.3d 813, 824 (Mo. 2000). Similarly, in an earlier stage in the appeal, the Missouri Court of Appeals stated that *Eichel* "held it is improper for disability pension benefits to be considered by the jury in assessing mitigation of damages or to show malingering." *Giddens v. Kansas City Southern Ry. Co.*, 937 S.W.2d 300, 304 (Mo. App. 1996).[15]

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disability benefits to mitigate damages was "necessary to the holding." 59 F.3d at 1033. Regardless of how this aspect of the *Eichel* opinion is characterized, it is clear that the railroad had not contended the evidence could be considered in mitigation of damages: thus, as it was not an issue in controversy, it is unlikely this Court ever had the benefit of briefs and arguments on the question.

[14] The trial court first disallowed the plaintiff to be questioned about his disability pension, but subsequently granted a new trial, finding, among other things, it had incorrectly ruled on this issue.

[15] Citing *Moore v. Missouri Pac. R.R.*, 825 S.W.2d 839 (Mo. Banc 1992), the Court of Appeals acknowledged that such evidence may be admitted if the plaintiff injects his financial condition into the case, but held that here the plaintiff did not do so. 937 S.W.2d at 305. The Missouri Supreme Court subsequently ruled that petitioner was precluded from raising that issue by the "law of the case doctrine." 29 S.W. 3d at 824.

As in the case below, *Eichel* typically is read to require a *per se* rule of inadmissibly of what is often a relevant and probative piece of evidence in FELA cases, i.e., that the plaintiff is already receiving, and will continue to receive, a substantial payment directly related to the disability for which compensation is sought from the railroad.[16] Courts accept as gospel that the prejudicial effect of such evidence always outweighs its probative value.[17]

This result which lower courts attribute with consistency to *Eichel*—that the jury must remain ignorant of the plaintiff's eligibility for a RRA disability pension—is neither called for by FELA nor consistent with the common law collateral source rule upon which the "*Eichel* rule" is premised. Moreover, it turns a blind eye to the broad discretion typically afforded trial judges in admitting relevant evidence under the Federal Rules of Evidence.[18] Nonetheless, when confronted with attempts by FELA defendants to introduce evidence of the plaintiff's receipt of disability benefits, most court feel constrained by *Eichel* from undertaking an analysis of the purpose of the collateral source rule and the nature of the

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[16] "*Eichel* instructs that the relevancy of the evidence is not the key issue but rather it is the balancing of unduly prejudicial evidence against its probative value. The [Supreme] court came down on the side of the potential harm that may be caused by the introduction of this evidence outweighing its probative value." *Giddens*, 937 S.W. 2d at 304.

[17] Courts seem willing only to go so far as to admit evidence of RRA disability benefits only where plaintiff has injected the issue of his financial condition into the case. *Moses v. Union Pac. R.R.*, 64 F.3d 413 (8th Cir. 1995); *Lange v. Missouri Pac. R.R.*, 703 F.2d 322 (8th Cir. 1983); *Gladden v. Henderson & Co.*, 385 F.2d 480 (3rd Cir. 1967).

[18] *See* Fed. R. Evid. 403. Appellate courts grant broad leeway to trial courts in ruling on the admissibility of evidence under Rule 403, "and will reverse only if the court committed a clear abuse of discretion." *United States v. Mitchell*, 31 F.2d 628, 631 (8th Cir. 1994).

benefits at issue.[19] ("Because of *[Eichel*'s] authority, we are constrained to hold it was prejudicial error to receive evidence of sums received by [plaintiff] from the Railroad Retirement Board." *Caughman*, 345 F.2d at 436.) Thus, only review of this issue by this Court can avoid continued misinterpretation of FELA by federal and state trial and appellate courts.[20]

### B. The Premise Which Underlies *Eichel* Is Erroneous And Should Be Reexamined By This Court

Because it was never at issue in *Eichel*, the notion that RRA disability benefits may not be considered in mitigation of FELA damages has never been properly examined by this Court. This unexamined premise, however, undergirds the *Eichel* Court's statement that the prejudicial effect of evidence of receipt of RRA disability benefits outweighs its probative value: a statement which prohibited petitioner from introducing important evidence in the case below.

Commenting on *Eichel* defendant New York Central's decision not to argue that it could offset RRA disability benefits received by the plaintiff against FELA damages, this Court observed that such benefits are not attributable to the employer, citing to *N.Y., N.H. & H. R.R. v. Leary*, 204 F.2d

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[19] In *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838 (1st Cir. 1998), the Court partially freed itself from the imaginary shackles of *Eichel*, affirming, as within the trial court's discretion, admission of Railroad Retirement disability payments to show the plaintiff's lack of motivation to return to work. Thus, as petitioner points out, there is a split in the circuits on this issue.

[20] This Court has granted *certiorari* to address claims that the lower courts misconceived the meaning of a prior Supreme Court decision. *See e.g.,Wilkinson v. United States*, 365 U.S. 399 (1961). This Court has granted *certiorari* in recent cases to assure that lower courts interpret FELA correctly. *E.g., Norfolk & Western Ry. v. Hiles*, 516 U.S. 400 (1996); *Consolidated Rail Corp v. Gottshall*, 512 U.S. 532 (1994).

461 (1st Cir.), *cert. denied,* 346 U.S. 856 (1953). Then, addressing the only issue in controversy, this Court opined that the likelihood of use (or rather, misuse) of such evidence by the jury for the prohibited purpose clearly outweighed its value, rendering it also inadmissible for the purpose of showing the plaintiff's lack of motivation to return to work.[21] This Court cited its decision in *Tipton v. Socony Mobile Oil Co.,* 375 U.S. 34 (1963) to support its concern over potential jury misuse of evidence of collateral benefits. In *Tipton* however, this Court noted that the trial judge had failed to frame a cautionary instruction for the jury on the proper use of the evidence, 375 U.S. at 35, calling into question the presumption made in numerous subsequent rulings by lower courts that the prejudicial impact of evidence of disability benefits *invariably* outweighs its probative value.

The authoritative character which lower courts give to this Court's remarks in *Eichel,* with respect to an issue never properly put before it, bears examination. A proper determination of whether and to what extent RRA disability benefits may be offset against a FELA award (or admitted for other purposes) requires a careful examination of the assumption that these benefits are "not attributable to the employer," a question never raised by the New York Central given its concession. In fact, the *Eichel* defendant's concession need not, and should not, be accepted as reflective of sound public policy, because disability benefits paid under the RRA are not a collateral source and admission of evidence of their receipt does not implicate the policies which underlie the common law rule against admission of collateral source payments to a plaintiff in a tort action. Viewed this

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[21] In doing so, it is important to note that this Court was simply affirming the trial court's exercise of its discretion to exclude the evidence, a ruling which had been reversed by the Second Circuit. Unfortunately, this point seems to have been lost on virtually all but the *McGrath* court.

way, the concern over improper use of the evidence by the jury is greatly diminished, and a *per se* rule of inadmissibility is entirely unwarranted. Consequently, trial courts should be free to exercise their discretion under Fed. R. Evid. 403 (or equivalent state evidentiary rules) about the value of the evidence in a particular FELA case.[22]

### C. Because Funding of RRA Occupational Disability Benefits Is Primarily Attributable To Railroad Employers, The Collateral Source Rule Is Not Applicable To These Payments

The rationale behind the collateral source rule does not apply with respect to RRA occupational disability benefits. In *Green*, the court summarized the purpose and rationale for the collateral source rule:

> The collateral source rule allows a plaintiff to seek full recovery from a tortfeasor even though an independent source has compensated the plaintiff in full or in part for the loss. The rationale for the rule is at least two-fold: First, public policy favors giving the plaintiff a double recovery rather than allowing a wrongdoer to enjoy reduced liability simply because the plaintiff received compensation from an *independent source* (emphasis supplied) *FDIC v. United Pac. Ins. Co.*, 20 F.3d 1070, 1083 (10th Cir. 1994). Second, by assuring a plaintiff's payments from a collateral source will not be reduced by a subsequent judgment, the rule encourages the maintenance of insurance. *Quinones v. Pennsylvania Gen. Ins. Co.*, 804 F.2d 1167, 1171 (10th Cir. 1986).

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[22] The trial court in *Green* did just that, admitting evidence of RRA disability benefit payments to avoid the unfairness of the railroad paying twice for the same injury. The Tenth Circuit reversed on the basis of *Eichel*.

59 F.3d at 1032.[23] "However, where the defendant has been the source of the payment, the damages, generally, cannot include the benefit conferred by the defendant." *Feeley v. United States*, 337 F.2d 924, 927 (3d Cir. 1964). Although "the collateral source rule . . . bars a tortfeasor from reducing the quantum of damages owed to a plaintiff by the amount of recovery the plaintiff receives from other sources of compensation that are independent of (or collateral to) the tortfeasor," *Davis v. Odeco, Inc.*, 18 F.3d 1237, 1243 (5th Cir. 1994), "[p]roperly interpreted [it] also prevents tortfeasors from paying twice for the same injury—a result that would achieve both overdeterrence and overcompensation." *Id.* at 1243, n.21. *See also Phillips v. Western Co. of N. Am.*, 953 F.2d 923, 931 (5th Cir. 1992).

It is clear that only where the plaintiff receives payment from a source independent from the defendant is it appropriate to permit a double recovery, and consequently to exclude evidence of the collateral payment. However, the premise that RRA occupational disability benefits are independent of the railroad employer does not withstand scrutiny of the program under which those benefits are administered. Occupational disability benefits are part of the Railroad Retirement System, *see supra* pp. 3-4, and while they are administered and paid by a government agency, they are largely funded by railroad employers. Like all Railroad Retirement benefits that are over and above those available to Social Security recipients, occupational disability benefits are financed by Tier II payroll taxes, of which railroad employers pay the lion's share. The Tier II payroll tax is equal to 21 percent of each employee's earnings (up to a threshold amount: $56,700 in 2000), with 16.1 percent being paid by the employer, 26 U.S.C. § 3221(b), and the remaining 4.9 per cent paid by the employee. 26 U.S.C. § 3201(b). Thus, about

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[23] *See also Kassman v. American Univ.*, 546 F.2d 1029, 1034 (D.C. Cir. 1976); 22 AM. JUR. 2d *Damages* § 566 (1988).

three-quarters of the funding for the benefit received by respondent and numerous other FELA plaintiffs is attributable to payments made by railroad employers. In fiscal year 1999, this payment amounted to about $1.9 billion.[24]

Because occupational disability benefits received under the RRA are not independent of, but rather are funded through substantial contributions made by, the employer, the primary rationale for the collateral source rule is not applicable. Moreover, because RRA disability benefit payments are not the result of individual decisions to procure insurance against disability, there is no concern that permitting an offset will reduce a railroad employee's motivation to maintain insurance. It is difficult, therefore, to see why introducing factual information about disability benefits received through a federally mandated program would prejudice FELA plaintiffs, unless it is their contention that it is prejudicial to present facts that would cause juries to avoid awarding damages for non-existent wage losses.[25]

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[24] RRB Annual Report at 9. Total Tier II payroll taxes payment was about $2.5 billion, thus the employer's share was 76.6 percent of that amount, or about $1.9 billion. The statement in *Leary*, cited in *Eichel*, to the effect that benefits received under the Railroad Retirement Act are not directly attributable to the contributions of the employer, is therefore inaccurate. While the money paid by a specific employer is not earmarked for a particular employee's benefits, money is fungible and, through their payment of billions of dollars in Tier II taxes over the years, railroads contribute substantial amounts to fund the payment of disability benefits to employees injured at work.

[25] To the extent there is concern that evidence of receipt of disability benefits might bias a jury against a finding of liability notwithstanding railroad negligence, a proper limiting instruction can be given by the trial court. *See Tipton*. Moreover, disallowing introduction of RRA disability benefits may well bias juries in the other direction. The incorrect assumption that an injured plaintiff has no source of income might lead to a finding of liability even if the jury did not believe the railroad had been negligent.

### D. In Non FELA Cases Courts Routinely Allow Offsets Where The Defendant Is The Source Of Another Benefit Received By The Plaintiff

Outside the context of FELA, where they have not felt constrained by *Eichel*, courts have undertaken a more flexible analysis with regard to the admissibility of evidence of collateral benefits. Where plaintiffs have sued for and received damages for disabilities or other harm suffered, while simultaneously being eligible for additional compensation for the same loss, courts have been willing to sanction offsets to prevent double recoveries.

In a case brought against the government under the Federal Tort Claims Act (FTCA), the government contended that the damage award should have been offset by a monthly disability payment, also paid by the government, which the plaintiff was receiving. While there was some confusion over the statutory basis for the disability payments, the court ordered a deduction from the award, holding that

> [w]hatever the nomenclature, the payments to plaintiff were essentially compensation for her disability. And to compensate her in full by lump-sum judgment under the Tort Claims Act for her total and permanent disability, and in addition compensate her by monthly payments for her disability, would constitute double payment *pro tanto* for such disability.

*United States v. Gray,* 199 F.2d 239, 244 (10th Cir. 1952). Consistent with this principle, in *EEOC v. Wyoming Retirement System,* 771 F.2d 1425 (10th Cir. 1985), the court upheld the deduction of Social Security payments from a backpay award made under the Age Discrimination in Employment Act. In exercising its discretion, the trial court had found that the claimants "would still be made whole even

though their damage awards were reduced to the extent of the Social Security payments." 771 F.2d at 1431.[26]

Even where the extent of the defendant's contribution toward the collateral payment is not entirely clear, courts have indicated that an effort should be made to credit the defendant to the extent it has paid twice for the same harm. In a suit brought under the FTCA, the plaintiff challenged the trial court's deduction of Social Security benefits from the award. *Steckler v. United States*, 549 F.2d 1372 (10th Cir. 1977). The court noted that to the extent the payments were based on contributions by the plaintiff and his employer they were collateral to the defendant. However, noting that "the government has supplemented the fund from time to time . . . some effort to ascertain the percentage or part contributed by the government should be made so as to permit a determination of the contribution of the employer and employee and their exclusion as collateral sources." 549 F.2d at 1379.

The notion that plaintiffs in tort cases should have the benefit of duplicative payments received from governmental or other sources has been expressly rejected by a number of states in favor of a policy which allows plaintiffs to be made whole, while avoiding a double recovery. *See Parker v. Esposito*, 677 A.2d 1159 (N.J. 1996)(Requiring offset of Social Security payments in negligence action pursuant to

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[26] In *Eichel*, this court suggested that RRA disability benefits should not be offset because they are akin to Social Security benefits, 375 U.S. at 254. However, it is clear that courts see no bar to offsetting payments made under the Social Security Act against damages awards. *See e.g., Flowers v. Komatsu Mining Systems, Inc.*, 165 F.3d 554 (7th Cir. 1999)("It is within the district court's discretion to set off–or not to set off–Social Security disability payments" against an award under the Americans With Disabilities Act. 165 F.3d at 558.); *Hassan v. United States Postal Service*, 842 F.2d 260 (11th Cir. 1988)(Not error to deduct Social Security benefits from FTCA award per Florida law.)

New Jersey law.); *Haberkorn v. Chrysler Corp.*, 533 N.W.2d 373 (Mich. App. 1995) (Requiring offset of Social Security payments in product liability action pursuant to Michigan law.) *Frey v. Smith*, 751 F.Supp. 1052 (N.D.N.Y. 1990) (Requiring offset of Social Security payments in wrongful death action pursuant to New York law.)

## II. Introducing Evidence of A Railroad Employee's Receipt of Railroad Retirement Disability Benefits is Consistent With the Purposes of FELA

There is no justification for deviating from the principles of compensation recognized by numerous courts and state legislatures simply to maintain a special, expansive collateral source rule for the benefit of FELA plaintiffs.[27] Like the plaintiff in this case, numerous railroad employees who have received awards under FELA also collect monthly RRA disability payments. Although Congress has chosen to confer on railroad employees unique and favored treatment under both FELA and the Railroad Retirement system—and only Congress can change that status—no law or public policy requires either that (1) a railroad employee be compensated twice for the same injury, or (2) railroad employers pay twice for that injury.

Even if a FELA jury takes into account receipt of RRA disability benefits, at worst the plaintiff-employee would still receive his or her full wage loss through a combination of the disability benefits received and the damages award for lost earnings from the defendant (and would also be entitled to

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[27] Some Courts have read *Eichel* as requiring a special rule for FELA cases. *See e.g., Sheehy* ("[T]he discretion [under FRE 403] normally applicable to admit all relevant evidence of collateral benefits is greatly limited in FELA cases." 631 F.2d at 652.); *Page supra* ("Both *Tipton* and *Eichel* reflect a strong public policy against the use of such collateral source evidence in FELA and analogous Jones Act-maritime law seamen's cases." 349 F.2d at 822.)

any noneconomic damages proven). So long as the employee receives the equivalent of his full wage loss, he or she is being made whole, which, of course, is the purpose of FELA. *Michigan Central R.R. v. Vreeland*, 227 U.S. 59, 70 (1913).

The FELA does not contemplate that the plaintiff receive any more than the full actual loss suffered as a consequence of the injury. In *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490 (1980), this Court held that a trial court may not preclude a railroad from introducing evidence of the income taxes payable on the plaintiff's past and future wages. Such evidence would tend to decrease the amount of damages for which the railroad would be liable to the injured employee (from gross pay to net pay). Nonetheless, even though it may serve to reduce the defendant's liability, such evidence is appropriate because the goal of FELA is to replace only what the injured party has lost. *Id.* at 496, n.10. Reexamination of *Eichel* would be consistent with the principles announced in *Leipelt*.[28]

Other recent decisions by this Court demonstrate that nothing requires that FELA be interpreted to enhance the likelihood, or inflate the amount, of recovery by the employee when such an interpretation is not supported by the words of the statute or the principles that govern ordinary negligence cases.[29] Though in enacting FELA Congress took specific

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[28] Just as an expert can testify on the likely effect of taxes on an employee's future wages, 444 U.S. at 494, testimony could be elicited on the portion of an RRA benefit attributable to the employers' contribution, allowing a jury to make a proper offset.

[29] In *Monessen Southwestern R.R. v. Morgan*, 486 U.S. 330 (1988), this Court declined to find that prejudgment interest was available under FELA, reasoning that Congress had not explicitly provided for it and that it generally was not recognized at common law when FELA was enacted. This Court also refused to expand the common law zone-of-danger test for adjudicating FELA claims alleging intentional infliction of emotional distress. *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424 (1997).

affirmative steps to lower the then-existing common law barriers to recovery,[30] where Congress did not specifically alter the common law, FELA jurisprudence is to be guided by generally applicable common law principles. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994). Thus, there is no basis for assuming that the collateral source rule acquires any special application in the context of FELA, or that it be applied to facilitate a double recovery for railroad employees even when to do so would not effectuate FELA's purpose.

Reviewing this case will allow this Court carefully to consider the important policy issues raised by the question of whether and when it is appropriate to introduce evidence of a FELA plaintiff's receipt of RRA disability benefits, an analysis which heretofore has not been undertaken. To leave the ruling below undisturbed would permit rail employees to continue to receive both the full amount of disability benefits for which they qualify and to seek compensation for full wage loss under FELA, with the juries hearing their claims unaware of the double recovery and unable to consider the impact it might have on the plaintiff's motivation to return to work, let alone the financial consequences of the undisclosed double recovery. A matter which so fundamentally affects the rights of FELA litigants deserves careful review by this Court.

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[30] *See* 45 U.S.C. § 53, eliminating the defense of contributory negligence in favor of comparative negligence, and 45 U.S.C. § 54, eliminating the assumption of the risk defense.

## CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Missouri Supreme Court in this case be granted.

Respectfully submitted,

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